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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 987 123

AZ DIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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AZ DIN,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 2, 1956, Petition for Rehearing having been filed March 30, 1956 and having been denied May 11, 1956.

CITATIONS TO OPINIONS BELOW.

No opinion was filed in the District Court. The opinion of the Court of Appeals, Ninth Circuit, printed in Appendix A hereto, infra, page i, is reported in ..... F. 2d .....

JURISDICTION.

The judgment of the United States Court of Appeals was entered on March 2, 1956. A timely petition for rehearing was filed March 30, 1956. Rehearing was denied on May 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Supreme Court Rule 22.

QUESTIONS PRESENTED.

(1) Whether a conviction obtained in a United States District Court under a Federal criminal statute[1] by evidence procured by state officials after an illegal search and seizure and which would have been suppressed in a State court prosecution for the same offense, is valid.

(2) Whether failure to object to, or move to suppress, the evidence at the trial court level[2] waived the point, where failure to object was in acceptance of former rulings of this court holding such illegally

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[1]21 USC Sec. 188-188n relating to production and distribution of the opium poppy.

[2]Objection was made and the point raised on appeal to the Court of Appeals, Ninth Circuit.

seized evidence admissible, and in further acceptance of the nonexclusion rule then applicable in California, but later changed.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

The constitutional provisions involved are the Fourth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States; also Rule 41 of Federal Rules of Criminal Procedure. They are set forth in Appendix B (infra, pp. xi-xii).

STATEMENT.

Petitioner was convicted in the United States District Court for the Northern District of California upon a verdict finding him guilty under 21 USC Sec. 188-188n of wilfully producing and permitting production of the opium poppy and of wilfully obtaining seed for the purposes of opium poppy production and was sentenced to imprisonment and to pay a fine (R. pp. 3-7). The principal evidence against Petitioner was bottles of seed identified as opium poppy seeds found in the Petitioner's dwelling (R. pp. 38, 39) and a sack of opium pods found in his garage (R. p. 14) without which there could have been no conviction. This seed was obtained in the following manner: Joseph H. House, inspector of the Narcotics Bureau, State of California, visited the Petitioner's ranch in Colusa County, California, on June 3, 1954, during

the Petitioner's absence (R. p. 12). There was with him Undersheriff Leverett and Deputy Sheriff Crawford, both State officers. (R. p. 13). They went into Petitioner's fields, hoed up plants, went into Petitioner's garage and obtained certain opium poppy pods (R. p. 14). They then entered his house walked into his kitchen, all during his absence and seized certain quart jars of opium poppy seed (R. p. 15). Then one of the officers left, found Petitioner in another field and brought him in for questioning (R. 17). There was no contention that they had any warrant to search the defendant's premises or that they had any permission from Petitioner to make the entry or to seize the pods or jars of seed which were taken. (R. pp. 14, 15; 37). It was conceded that without this entry and seizure there could have been no conviction.

The pods and seed thus seized were analyzed and proved to be of the opium poppy by expert analysts (R. pp. 49, 53 and 56). In a conversation with the officers Petitioner told them the seed came partially from a drug store, partially from plants grown, and were used by him to make a beverage. (R. pp. 19, 22).

This was the entire case of the prosecution. Motion for acquittal was made and denied. No proof was offered by the defense. (R. pp. 57-63).

No objection was made to the evidence offered by the Government as the result of the search and seizure mentioned above. The reason was that Petitioner's counsel at the time of the trial March 2, 1955 *accepted*

the rule of this court in *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S. Ct. 341, that while evidence obtained by a United States Marshal by an illegal search and seizure would not be received in evidence, papers and property seized by state policemen not acting under any claim of Federal authority did not come within the rule and could be used. (This rule had been reasserted in the cases cited infra p. 6). And Petitioner also accepted the *nonexclusion* rule then applicable in California as decided in *People v. Le Doux,* 155 Cal. 535 (102 P. 517) and *People v. Mayan,* 188 Cal. 237 (205 P. 435, 24 A.L.R. 1383).

In California in April, 1955, after the trial and appeal in the instant case, the California Supreme Court in *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 expressly overruled its earlier decisions. *People v. Le Doux* (supra) and *People v. Mayan* (supra) departed from the nonexclusion rule and held for the first time that evidence obtained by state officers through an illegal search and seizure could not be admitted in evidence in a criminal case.

Meanwhile, as will be noted under the Reasons for Granting the Writ below this court by a series of decisions involving illegal searches and seizures (see infra pp. 6-12) had been gradually closing the gap between what may be termed the opening wedge of the *Weeks* case excluding evidence illegally seized by Federal officers and the admission of all other illegally obtained evidence.

Feeling no longer barred by established rules, therefore, Petitioner *did* raise the question on the appeal

in this action. The Court of Appeals, however, took the position that (1) the point had been waived by the fact that "no motion was made to suppress the evidence and (2) that the evidence was obtained by State officers without any participation by Federal officers and therefore was admissible.

Petition for rehearing was seasonably made. All of the cases which are cited herein were cited and the same arguments made. The petition was denied May 11, 1956. Although the only official expression of the Court of Appeals' opinion is the written reported opinion, it is to be noted that Justice Pope during oral argument commented that the court would be bound by the previously established rule of this court that the nonexclusion rule applied to evidence illegally obtained by state officers.

REASONS FOR GRANTING THE WRIT.

(1) A review of recent cases of this court seems to compel the conclusion that a majority of the court now holds the opinion that evidence obtained by an illegal search and seizure is inadmissible regardless of whether the evidence was illegally seized by Federal or State officers, *particularly where the State involved, by adopting the rule of exclusion, would have refused to admit it.*

Following the dicta in *Weeks v. U.S.*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 applying the nonexclusion rule to evidence illegally obtained by state officers, the same rule was reasserted in *Burdeau v. McDowell,*

256 U.S. 465, 65 L.Ed. 1048, 41 S.Ct. 574, 13 A.L.R. 1159 (in which the collectors of the illegal evidence were referred to as "private persons"). In the *Burdeau* case the dissent of Mr. Justice Brandeis (in which Mr. Justice Holmes concurred) said:

> "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

(a) In *Gambino v. United States* (1927) 274 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381 (opinion by Mr. Justice Brandeis) it was held in a National Prohibition Act prosecution that evidence illegally obtained from state officers, although acting not under the direction of Federal officials, *in cooperation with them,* must be excluded.

(b) In *Lustig v. United States,* 338 U.S. 74, 93 L.Ed. 1819, 69 S.Ct. 1372 (decided June 24, 1949) it was held that the illegally obtained evidence should have been suppressed because of Federal participation in the illegal search. Mr. Justice Frankfurter in the majority opinion states (on page 1823 of L.Ed):

> "*. . . it is not necessary to consider what would be the result if the search had been conducted entirely by State officers.*"*

The following language from the majority opinion is also to be noted:

> "It surely can make no difference whether a state officer turns up the evidence and hands it

*Emphasis ours throughout.

over to a federal agent for his critical inspection with a view to its use in a federal prosecution or the federal agent himself takes the articles out of the bag."

(c) The concurring opinion in the *Lustig* case of Mr. Justice Murphy, with whom Mr. Justice Douglas and Mr. Justice Rutledge joined, would have placed the holding upon broader grounds (on p. 1824 of L.Ed.):

". . . the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

(d) The latest expression by this court is in *Rea v. United States* (decided January 16, 1956) 350 U.S. 214, 100 L.Ed. 213, 76 S.Ct. 292 where, after evidence illegally obtained by Federal officials was suppressed in a prosecution for the acquisition of marihuana under a Federal statute in the United States District Court, a complaint was sworn to by the same official in a State court of New Mexico involving the same offense (New Mexico being one of the jurisdictions following the rule of nonexclusion). Defendant there sought to enjoin prosecution of the charge in the State court by the Federal official.

It was held that the policy of the Federal Rules of Criminal Procedure governing searches and seizures would be defeated if a Federal officer could use the fruits of an unlawful search either in Federal or State proceedings.

(e) Petitioner postulates that the policy of the Federal Rules is equally defeated if the rule is adhered to that United States attorneys in prosecuting for Federal offenses may evade the search and seizure requirements of the Rules through the simple device of refraining from *direct* authorization to state officers to collect evidence illegally while at the same time welcoming its use in Federal prosecutions.

(f) Particularly in states which have adopted the rule of exclusion (as California now has) we would be treated to the very unpalatable spectacle of a use of the Federal courts as forums where state officers could bring their illegally obtained evidence, in defiance of the 4th amendment, to obtain convictions barred by the state courts.

In *People v. Cahan* (April 1955) 44 Cal. 2d 434, 282 P. 2d 905 the California Supreme Court reversed its well established rule to the contrary and adopted the rule of exclusion in State prosecutions, holding that illegal searches and seizures violated both the State and Federal constitutions; that although (under *Wolf v. Colorado* (June 1949) 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359) it had been held the guarantees of the Fourteenth Amendment did not require States to adopt the exclusionary rule, the rule should nevertheless be adopted in California because "the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, (and therefore) the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced"

(g) Where a State has abandoned the rule of nonexclusion in favor of the opposite rule, there is language in the majority opinion in *Irvine v. California,* 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 indicative of the rule urged by this Petition. On p. 570 (of L.Ed.):

> "Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of the federal power."

This seems a clear warning that failure by the states following the *Wolf* decision to deter illegal searches and seizures would result in a declaration by this court that minimal standards of due process have not been met.

California has met the challenge by the *Cahan* case. Would it not indeed be an anomaly now to have this court set back California in her housecleaning by encouraging her officers, thwarted by her own courts, to find asylum for their disregard of constitutional guarantees by bringing their illegal evidence into the Federal courts?

(2) The fact that no motion was made to suppress the evidence does not constitute a waiver of the right to object where Petitioner was merely accepting the then established rule of nonexclusion.

The same point was raised in California in the case of *People v. Kitchens* (decided by the California Supreme Court in February 1956) 46 A.C. 257, 294 P.

2d 17 where, in a state criminal prosecution for possession of marijuana illegally obtained, evidence was not objected to at the trial, the defendant having accepted the then established California rule of nonexclusion, a rule which had been thereafter reversed in *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905.

As our argument we adopt the language of the California Supreme Court in the *Kitchens* case holding that the point had not been waived (on page 260 of AC):

> "Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the Cahan decision. This practice was adopted by the federal courts following the decision of the United States Supreme Court in *McNabb v. United States,* 318 U.S. 332 (63 S.Ct. 608, 87 L.Ed. 819), holding confessions obtained during a period of illegal detention inadmissible even if voluntarily made. (*Gros v. United States,* 136 F. 2d 878, 880-881; *Runnells v. United States,* 138 F. 2d 346, 347; *United States v. Haupt,* 136 F. 2d 661, 668-669; see also *Gambino v. United States,* 274 U.S. 310, 319 (48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381); *Clyatt v. United States,* 197 U.S. 207, 221-222 (25 S.Ct. 429, 49 L.Ed. 726); *Wiborg v. United States,* 163 U.S. 632, 658 (16 S.Ct. 1127, 1197, 41 L.Ed. 289); *Mott v. Smith,* 16 Cal. 533, 555; *People v. Evans,* 39 Cal. 2d 242, 248-249 (246 P. 2d 636).) A contrary holding would place an unreasonable burden

on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover in view of the decisions of this court prior to *People v. Cahan*, supra an objection would have been futile, and 'The law neither does nor requires idle acts'. (Civ. Code Sec. 3532.)"

(3) There was sufficient evidence in the record that the evidence was illegally obtained. The state officers merely walked onto the premises of the Petitioner (a ranch) during his absence, went into his fields, cut down poppy plants growing there, went into his garage and obtained poppy plant pods, and then entered his house, also during his absence, and seized the jars of seed. They then sought out the Petitioner in another field and questioned him.

There is no question but that the officers proceeded illegally and in defiance of the Petitioner's constitutionally guaranteed rights. But even if there were a question then the matter should have been remanded in view of the changed rule for further evidence. *United States v. Rio Grande Dam & Irrigation Co.*, 184 U.S. 49, 46 L.Ed. 619, 22 S.Ct. 428.

The rule expressly provides that a motion to suppress may be delayed where the defendant "was not aware of the grounds for the motion" (Federal Rules of Criminal Procedure Rule 41 (e)) and inherent equity powers should have permitted the objection at the appeals level where the reason for the delay is the change of so fundamental a rule of law.

Reversal here will of course accomplish the same result.

(4) The question is of importance. Settlement of the question is plainly in the public interest. Not only in the field of criminal narcotic legislation, but in many other fields State and Federal Acts run parallel. The *Rea* case has established the Federal officials may not defy the 4th amendment and Federal Rules of Criminal Procedure by taking their illegal evidence into the state courts. This case should establish whether State officials are to be encouraged in their defiance of the 14th amendment and State rules of criminal procedure by moving into the Federal courts.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, May 25, 1956.

Respectfully submitted,

ROBERT W. KENNY,

DUARD F. GEIS,

FRED PIERCE,

Counsel for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Az Din, Appellant, vs. United States of America, Appellee.	No. 14,752 Mar. 2, 1956

Appeal from the United States District Court for the Northern District of California, Northern Division.

Before: Denman, Chief Judge, and Pope and Lemmon, Circuit Judges.

Denman, Chief Judge:

Az Din appeals from his convictions in the United States District Court for the Northern District of California of wilfully producing opium poppies,[1] knowingly permitting the production of opium poppies on his property,[2] and obtaining opium poppy

[1]Under 21 U.S.C. §188 b it is unlawful for any unlicensed person "to produce . . . the opium poppy . . ."

[2]Under 21 U.S.C. §188 b it is unlawful for any unlicensed person "to permit the production of the opium poppy in or upon a place owned . . . or controlled by him."

seed for the purpose of opium poppy production.[3] He was sentenced to three years imprisonment and fined $500.00 on each count, the sentences to run concurrently. He contends that the convictions on all three counts should be set aside because of the use of evidence obtained by an illegal search and seizure and misconduct in the closing argument to the jury on the part of the Assistant United States Attorney. It is further argued that the convictions on the first two counts should be reversed because there is no proof that the poppies found growing on appellant's property were opium poppies. Finally it is urged that the conviction on the third count should be reversed because the statute of limitations had run.

I. Alleged Errors Going to the Convictions on All Three Counts.

Appellant contends that evidence was used at his trial which was obtained by an illegal search and seizure. No motion was made to suppress this evidence either before or during trial as required by F.R.Crim.P. 41(e). Az Din urges that this court may reverse the convictions under its power to correct "plain error" under F.R.Crim.P. 52(b). Assuming that this court has such a power, this is not a

[3]Under 21 U.S.C. §188 f it is unlawful for any unlicensed person "to purchase or otherwise obtain, opium poppy seed for the purpose of opium poppy production: *Provided*, That the seed obtained from opium poppies produced by licensed producers may be sold or transferred by such producers to unlicensed persons, and may thereafter be resold or transferred, for ultimate consumption as a spice seed or for the manufacture of oil."

proper case for its exercise. The search and seizure here was by state officers. It is not shown they did not have a search warrant.

Of greater significance is the contention that Az Din was denied a fair trial by the conduct of the Assistant United States Attorney trying the case, in his closing argument to the jury. It is error for a prosecutor to appeal to passion and prejudice concerning matters irrelevant to the case.[4] However, where the trial judge has admonished the jury to disregard it such improper conduct justifies reversal only when "the remarks are not the kind the jury 'put out of their minds' simply by being told to do so."[5]

The following in the closing argument are contended to warrant reversal. First, objected to are the statements that Az Din might be ready to go into large scale production of opium poppies because of the large number of seeds found in his house, and the pointing out that Congress had prohibited the growing of the opium poppy because of the anti-social effects of opium and heroin. The inference that Az Din might have intended to go into large scale production was a possible one in light of the evidence in the case, and the Government had the right to go into the background of the statute before the jury. See,

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[4]Viereck v. United States, 318 U.S. 236, 247-248 (1943); Steele v. United States, 222 F.2d 628, 631 (Cir. 5, 1955).

[5]United States v. Georga, 210 F.2d 45, 47 (Cir. 3, 1954). See also, Beard v. United States, 222 F.2d 84, 95 (Cir. 4, 1955); United States v. Scoblick, 225 F.2d 779, 782 (Cir. 3, 1955).

Butler v. United States, 191 F.2d 433, 435 (Cir. 4, 1951).

Next, Az Din objects to the prosecutor's statements inferring that he was a user of narcotics. The Assistant United States Attorney stressed several times that this was a narcotics case, and then stated:

> "Furthermore, I do not believe that he just used the seeds to make the tea, either. Inasmuch as he was growing a narcotic plant, *it would seem to me that he would make use of the narcotic in the plant rather than the seed.* But as I mentioned before——
>
> "Mr. Mull: Your honor, that is not the evidence in this case which would give the government attorney the right to infer to this jury that this defendant would be more inclined to use the narcotic which would come from these plants. In other words, intimate to this jury that this defendant is a user of narcotics, and I object to it and cite it as prejudicial error and misconduct and ask the jury be instructed to disregard it and ask for a mistrial.
>
> "The Court: The motion for a mistrial will be denied. Ladies and gentlemen of the jury, there is no evidence, as you know, to the effect that the defendant in this particular case was a user of narcotics, that he intended to use these poppies for the ultimate production of narcotics, and the evidence, so far as the Court recalls, is merely that he was producing the plant, as testified. You are instructed that in your deliberations and in arriving at your verdict, you should dismiss from your mind any comment made by counsel on this particular point. You may proceed, counsel.

> "Mr. Eddy: Ladies and gentlemen, I wish to apologize to the Court and to you, ladies and gentlemen, if I have done anything which is out of line. I wish to do my duty for the government of the United States." [Emphasis added.]

If the italicized statement had any purpose, it was an appeal to prejudice. It was not relevant to the charge against Az Din or justified by the evidence in the case. However, upon objection, the trial court clearly instructed the jury to disregard it. There is no reason to believe that the jury did not do so. Certainly, the abuse here nowhere near approached those struck down in the Viereck[6] and Georga[7] cases where the appeals to prejudice were stronger and made at much greater length. We hold that here was no reversible error.

II. Alleged Errors Going to Convictions on Specific Counts.

A. Counts One and Two.

Appellant contends that the United States failed to prove him guilty as charged in counts one and two of the indictment of producing or allowing to be produced opium poppies on his property. He asserts there is no evidence that the poppies found growing on his farm by California Narcotics Agents were in fact *opium* poppies.

There was sufficient circumstantial evidence that the poppies were opium poppies. The California officers

[6]Viereck v. United States, supra note 4.

[7]United States v. Georga, supra note 5.

were qualified as experts and testified they could recognize the opium poppy. They pulled up the poppy plants growing on Az Din's farm, destroying the plants but saving the pods. Opium is derived from the pod of the opium poppy. The jury could have inferred that the plants would not have been pulled up by experts had they been innocent ornamental flowers. Moreover, Narcotics Inspector House testified that the poppies found on the premises had a white flower. Later he gave expert testimony about the characteristics of the opium poppy. He stated "The flowers are very pretty. They are sometimes white, sometimes green. *In this instance* it is a white flower." [Emphasis added.] Finally one of the agents testified that Az Din had told him that although he knew it was against the law to grow opium poppies he did it anyway.[8]

B. Count Three on the Purchase of Opium Poppy Seed.

Az Din contends that the Assistant United States Attorney in his argument to the jury invited it to reach a conclusion not supported by the evidence but solely on his personal knowledge. The prosecutor told the jury that he did not believe Az Din's story that he had purchased the opium poppy seeds in a drug store because "you just can't buy poppy seeds in any drug store in this country I know of." Such statement of personal experience on matters not in

[8]This admission was sufficiently corroborated. See 22 U. of Chicago L. Rev. 902 (1955); 1 Stanford L. Rev. 378 (1955).

the record are reprehensible.[9] However, the trial court told the jury to disregard it as there was no such evidence in the record and stated, "you are admonished, ladies and gentlemen of the jury, to give no credence to that particular point."

In both Berger v. United States, 295 U.S. 78 (1935) and Taliaferro v. United States, 47 F.2d 699 (Cir. 9, 1931) federal prosecutors had stated to the jury that they knew certain facts were true although no such evidence had been adduced at the trial. In neither case did the trial court act to curb this misconduct or adequately warn the jury to ignore the statements. These cases therefore involve a different situation from the one present here. Here the Assistant United States Attorney stated only that he knew of no drug store where one could buy opium poppy seeds, inferentially asking the jury if they knew of such a drug store. The trial court clearly and completely instructed the jury that there was no evidence in the record that drug stores did not sell opium poppy seeds. There is no reason to believe its members failed to heed the trial judge. We hold this is not reversible error.

The prosecutor immediately after the court's admonition said, "I do not believe the defendant when he said he got the seed from the drug store and the

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[9]Berger v. United States, 295 U.S. 78 (1935); Taliaferro v. United States 47 F.2d 699 (Cir. 9, 1931); Henderson v. United States, 218 F2d 14 (Cir. 6, 1955); United States v. Georga, 210 F.2d 45, 47 (Cir. 3, 1954); Pritchett v. United States, 185 F.2d 438, 440 (D.C Cir. 1950).

basis of my belief is from my own experience. No objection was made to this remark, and we deem the defendant to have regarded it as covered by what the court had said previously. F.R.Crim.P. 51; Myres v. United States, 174 F.2d 329, 339 (Cir. 8, 1949).

Appellant further contends that the District Court erred in not granting a motion to dismiss the third count on the ground that the Government had failed to prove that the seeds in question were purchased within three years before June 14, 1954, the date of the indictment. 18 U.S.C. §3282, as it read on June 14, 1954, provided for a three year statute of limitations on non-capital offenses. The Government has the burden of proving that the purchase was within this period. Butler v. United States, 33 F.2d 382 (Cir. 9, 1929).

The United States contends that the following testimony sufficiently shows purchase within the three year limitation period:

> "Q. Did the defendant say anything about where he might have obtained the seeds which you have seen?
>
> "A. He mentioned buying them in a drug store. That was the first and I believe he also stated that he had used some of the seeds later that year from plants he had the previous year."

All this testimony indicates is that: (1) Az Din claimed to have purchased the opium poppy seeds at a drug store *in some unspecified year,* and (2) that later in that year he purchased the seeds, he also used seeds from plants he had the year before. This

does not establish that the year of purchase was within the required three years.

The judgments of conviction as to counts one and two are affirmed. That as to count three is reversed.

Pope, Circuit Judge, concurring:

I concur in Judge Denman's opinion but I do not join in any implied criticism of the remarks made by the Government attorney to the effect that he disbelieved defendant's story about using the seeds for tea. I think that the quoted remarks fairly interpreted meant no more than the statement of the attorney that since defendant was growing narcotic plants it was probable that the defendant was using the seeds for this purpose rather than for brewing tea. It is true that the trial court out of an appropriate abundance of caution instructed the jury that there was no evidence that defendant was a user of narcotics, but I do not believe the United States Attorney's remarks could properly be construed to say that.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 2, 1956. Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Az Din, Appellant, vs. United States of America, Appellee.	No. 14,752

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause as to counts one and two be, and hereby is affirmed, and that the judgment as to count three be, and hereby is reversed.

(Endorsed) Judgment
Filed and Entered: March 2, 1956
Paul P. O'Brien, Clerk.

Appendix C

United States Contitution—Amendment IV

Section 1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution—Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Criminal Procedure—Rule 41 (e)

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant,

or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 123

AZ DIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 109-114; Pet. App. A i-ix) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (R. 115; Pet. App. B x) was entered on March 2, 1956. A petition for rehearing was denied on May 11, 1956 (R. 116). The petition for a writ of certiorari was filed on May 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction should have been reversed on the basis of the contention that evidence had been unlawfully obtained by state officers, where

this argument was raised for the first time on appeal and the illegality of the state search is not established by the record.

STATUTE AND RULE INVOLVED

21 U.S.C. 188(b), (f), 56 Stat. 1045, 1047 provides:

> (b) It shall be unlawful for any person who is not the holder of a license authorizing him to produce the opium poppy, duly issued to him by the Secretary of the Treasury in accordance with the provisions of sections 188-188n of this title, to produce or attempt to produce the opium poppy, or to permit the production of the opium poppy in or upon any place owned, occupied, used, or controlled by him.
>
> * * * * *
>
> (f) It shall be unlawful for any person to sell, transfer, convey any interest in, or give away, except to a person duly licensed under sections 188-188n of this title, or for any unlicensed person to purchase or otherwise obtain, opium poppy seed for the purpose of opium poppy production: *Provided*, That the seed obtained from opium poppies produced by licensed producers may be sold or transferred by such producers to unlicensed persons, and may thereafter be resold or transferred, for ultimate consumption as a spice seed or for the manufacture of oil.

Rule 41(e), F. R. Crim. P. provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of

the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

In the United States District Court for the Northern District of California, petitioner was convicted by a jury (R. 5) on all counts of a three-count indictment (R. 3-4) charging that, without having obtained a license from the Secretary of the Treasury, he wilfully produced opium poppies, knowingly permitted the production of opium poppies on his property, and obtained poppy seed for the purpose of opium poppy production—in violation of 21 U.S.C. 188(b), (f), *supra*, p. 2. He was sentenced to three years imprisonment and a five hundred dollar fine on each count, the prison terms

to run concurrently (R. 5-7). The Court of Appeals affirmed the convictions on the first two counts, but it reversed as to the count charging the obtaining of opium poppy seeds on the ground that the proof did not show that petitioner obtained the seeds within the then applicable three year statute of limitations (R. 109-114, Pet. App. A i-ix).

No objection was raised at the trial to the admission of evidence as to the poppy plants and seeds which were the basis of the charge. For the first time in the Court of Appeals,[1] petitioner claimed that this evidence had been unlawfully seized by state officers and should have been excluded. The record on this issue—which is the only one raised here—may be summarized as follows:

Officers of the California Narcotics Bureau came to petitioner's home in early afternoon and found growing in his fenced yard a flower bed containing approximately one hundred and fifty opium poppy plants, and a few isolated plants near the house (R. 12-14). The house was set back approximately 100 yards from the county road (R. 24, 44), and the flower bed, approximately eight by fourteen feet (R. 32), was located near the middle of the yard (R. 13). The plants were six feet tall (R. 14), bright and colorful (R. 24), and the flowers were visible "as you enter the property" (R. 24, 44). One of the officers took pictures of the opium plants which were received in evidence (R. 32, 33). The officers pulled up the plants and removed the pods (R. 28).

They knocked on the door and, after identifying themselves and their mission, asked permission to enter

[1] In petitioner's "closing brief" in that court.

(R. 37). They were told that petitioner was in an adjacent field (R. 37). Search of the house yielded several containers of opium poppy seeds (R. 14-17). Following the search (R. 27), one of the officers brought petitioner from a nearby field (R. 17). When questioned in his yard, petitioner stated that he had obtained the seeds from a drug store which he could not identify (R. 35) and had merely thrown a handful in the yard (R. 18); that he liked flowers and had transplanted the isolated plants to the east and west of the house (R. 18). On being asked whether this was all of the seeds he had, petitioner stated that it was (R 18, 21), but on further questioning he admitted that he had obtained some of the seeds found in the house from poppy pods and some from the drug store; that he ground them up and made a tea from them which he drank for its cooling effect; that he realized that he was breaking the law in growing the opium poppy (R. 21, 35, 39, 40). The search of the house was then completed. The officers took petitioner and the evidence to the county jail (R. 22). Federal officers were notified of the violation on the following day (R. 22).

ARGUMENT

1. Petitioner's request to have this Court reconsider the rule as to the admissibility in federal prosecutions of evidence illegally seized by state officers makes the unsupported assumption that an illegal state search appears from the face of this record.

In the first place, as the Court of Appeals noted (Pet. App. A iii), the record does not show that the search was without a warrant. This omission is particularly relevant since the point was not explored

because petitioner made no objection to the admissibility of the evidence.

In the second place, it seems that, if there was any illegality at all in the search, it related only to the poppy seeds found in the house, and petitioner's conviction for possessing these seeds was reversed. As to the plants, the evidence against petitioner consisted of the officers' testimony as to what they saw in the yard, the photographs of the plants, and petitioner's admissions. None of this evidence was obtained by an unlawful search. The officers approached petitioner's residence by a county road which ran only 100 yards from his house. One testified that "as you enter from the road, you come in approximately one block, the house is facing east, the side is to the south, the rear is to the west. You come in on the south side of the house; there is a yard which is fenced and approximately the middle or near the east front of the yard there was a patch of approximately 150 poppy plants, approximately six feet tall. That was the first thing that was observed." It would seem from this that the poppy plants were about 50 yards from the road; and all three officers testified that they were visible as they entered the property (R. 13, 31, 34).[2] If the plants recognized as opium poppies (R. 13, 23, 25) were visible from the road, clearly no illegal search was involved in observing them and in taking action to seize the contraband and look for the occupant on the basis of the felony being committed in the observers' presence. *Hester* v. *United States*, 265 U.S. 57; cf.

[2] The destruction of the plants was proper since they were contraband. In any event, the destruction would not affect the legality of that which was observed. Cf. *Lee* v. *United States*, 274 U.S. 559, 563.

Olmstead v. *United States*, 277 U.S. 438, 464. And even if petitioner's yard was entered before the plants were observed, the mere entry onto open premises would not make the observations illegal (*Hester* v. *United States, supra*), particularly since it is entirely possible that the officers already had information which would have justified the arrest of petitioner. Cf. *Trupiano* v. *United States*, 334 U.S. 699, 704, 705, holding that a warrant of arrest is not required in such circumstances.

2. Furthermore, petitioner's objection to the admissibility of the evidence came too late when it was raised for the first time on appeal. Fourth Amendment rights, like most other constitutional rights, may be waived, and they are waived when evidence allegedly seized in an illegal search is permitted to be introduced at the trial without objection. *Segurola* v. *United States*, 275 U.S. 106, 111, 112; *Landsborough* v. *United States*, 168 F. 2d 486 (C.A. 6), certiorari denied, 335 U.S. 826; *Morton* v. *United States*, 147 F. 2d 28 (C.A. D.C.), certiorari denied, 324 U.S. 875.

The advisability of adhering to this rule is well illustrated in this case where, in view of the absence of objection, no attempt was made by either side to explore either the basis on which the state officers entered petitioner's property or the possible existence of a warrant.

In these circumstances, it is no excuse that only after the trial in this case did the Supreme Court of California change its general rule as to the admissibility of evidence (see Pet. 9-12). Petitioner would have had to invoke a federal rule of evidence, not a state rule, and if he had laid the proper foundation the

record would, in all probability, have been much clearer as to the type of "search" which actually occurred.

3. Petitioner suggests no valid reason for the Court to reconsider the rule which has long pertained in the federal courts, that evidence seized by state officers, without federal cooperation, may be admitted in a federal prosecution even if the state search is illegal. *Weeks* v. *United States*, 232 U.S. 383, 398; *Byars* v. *United States*, 273 U.S. 28, 33; see *Lustig* v. *United States*, 338 U.S. 74 and *Irvine* v. *California*, 347 U.S. 128, 136. The ruling in *Rea* v. *United States*, 350 U.S. 214, does nothing to weaken the force of those decisions. Rather, to the extent that it treats the principle of exclusion as a disciplinary measure against federal officers, *Rea* lends force to the rule sustaining the admissibility of evidence secured in wholly state searches. The federal courts cannot undertake the task of disciplining state officers.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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